IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 26, 2007 Session

STATE OF TENNESSEE v. SHERRY SULFRIDGE

Direct Appeal from the Criminal Court for Claiborne County
No. 12732 E. Shayne Sexton, Judge

No. E2006-02220-CCA-R3-CD - Filed February 4, 2008

The appellant, Sherry Sulfridge, pled guilty in the Claiborne County Criminal Court to aggravated child neglect and reckless homicide with the length of her sentences to be determined by the trial court. After a sentencing hearing, the trial court sentenced the appellant to concurrent sentences of nineteen and three years, respectively. On appeal, the appellant contends that the trial court erred by enhancing her sentences based upon the victim's vulnerability. Upon review of the record and the parties' briefs, we conclude that the trial court properly enhanced the appellant's sentences. Nevertheless, we also conclude that the trial court erred by sentencing the appellant pursuant to the 2005 Sentencing Act in the absence of a valid waiver of her ex post facto rights and remand the case to the trial court for resentencing under the 1989 Sentencing Act or for the appellant to execute a written waiver of ex post facto protections.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Benjamin S. Pressnell, Tazewell, Tennessee, for the appellant, Sherry Sulfridge.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William Paul Phillips, District Attorney General; and Jared Effler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The appellant has failed to provide this court with a transcript of the guilty plea hearing. However, we have gleaned the following facts from the appellant's presentence report: On January 3, 2005, the police were called to 609 Coffey Road in New Tazwell, Tennessee. When they arrived, they found the six-year-old victim, who suffered from cerebral palsy, dead in her child seat. At the time of the victim's death, two women were babysitting the victim and her three siblings for the

childrens' mother, the appellant. When the police informed the appellant about the victim's death, the appellant gave them consent to search her home. During the search, the police found marijuana and evidence of other drug use. According to an autopsy report, the victim was dehydrated and malnourished, suffered from bed sores and lice, and had pneumonia. Blood toxicology tests revealed she was given alcohol while she was alive. The report concluded that the victim was neglected, that she died of severe dehydration as a consequence of malnutrition, and that pneumonia significantly contributed to her death.

A Claiborne County grand jury indicted the appellant for first degree felony murder committed during the perpetration of aggravated child neglect and aggravated child neglect. On April 4, 2006, the appellant pled guilty to reckless homicide and aggravated child neglect. Pursuant to the plea agreement, the trial court was to determine the length of the appellant's sentences after a sentencing hearing.

At the hearing, Morgan Rogers, a clinical therapist for Cherokee Health Systems, testified for the appellant that she first met the appellant in December 2003 after the appellant's oldest daughter alleged being sexually abused by the child's stepfather. Rogers met with the appellant twice to discuss the sexual abuse. During the second meeting, the appellant told Rogers that the allegations were unfounded. After the appellant was arrested and jailed in the instant case, Rogers began meeting with the appellant again. She visited with the appellant thirty-eight times from May 2005 to July 2006 for "grief work." Rogers stated that the appellant had suffered a lot of trauma, was depressed, and had not been allowed to see her other children while in jail. Rogers would not say the appellant expressed remorse for the victim's death but said the appellant "was very sorry that it happened" and "was very confused about the event because she couldn't get a good sequence of events of what had happened." Rogers described the appellant's background as "chaos." She interviewed the appellant's mother and learned the appellant was raised in poverty, had several stepfathers, attended several different schools, and attended special education classes until high school. Rogers stated that the appellant seemed to have "general knowledge" and was able to carry on day-to-day activities but did not seem to be able to think complexly or problem solve very well. Rogers suspected the appellant was mentally retarded but was not licensed to test her.

On cross-examination, Rogers testified that the appellant was devastated by the victim's death but that she did not remember the appellant's having accepted responsibility for it. She acknowledged that the appellant received a forensic evaluation and was found to be able to appreciate the wrongfulness of her actions. As a result, an insanity defense was not an option in this case.

Carol Money, the appellant's mother, testified that the appellant was not a bad mother and was good with her children. The victim had cerebral palsy, a feeding tube, and a tracheotomy. She was blind, almost deaf, had severe seizures, and could not walk or talk. The victim could not sit up straight and was confined to a specially-made child seat that prevented her from slumping down and developing pneumonia. Caring for the victim was difficult for the appellant. The victim received milk intravenously from 10:00 p.m. until 7:00 a.m., and the appellant had to feed the victim again

at 10:00 a.m., 1:00 p.m., and 4:00 p.m. The victim often regurgitated her food and had diarrhea. Carol Money helped the appellant often, but the two fathers of the appellant's children did not help the appellant. Money stated that she often kept the children on weekends, that they were always clean, and that the victim always had everything she needed. The appellant left her husband, Neal Lewis Sulfridge, after her oldest daughter alleged that he had molested her, and he paid the appellant two hundred fifty dollars per month for child support. Money said the appellant weighed only four pounds when she was born and had a cyst on her pituitary gland. The appellant was developmentally delayed, did not start walking until she was two years old, and did not become "potty trained" until she was two and one-half years old.

On cross-examination, Money testified that the victim was totally dependent on the appellant to feed her and change her diaper. She acknowledged that the victim allegedly had lice and bed sores at the time of her death and that the victim was supposed to get exercise to prevent the bed sores. She stated that she could not believe the victim died of starvation and thirst. She acknowledged that a breathing machine was supposed to be set up in the victim's room and stated that she did not know the machine was not being used to help the victim. Money said the appellant kept her house clean, and she denied seeing laundry, garbage, and dishes piled up in the home. She stated that she did not see any marijuana cigarettes or drugs in the house but that she learned after the victim's death that the appellant had used marijuana and cocaine. She acknowledged that the appellant received help for the victim through the Department of Children's Services and East Tennessee Children's Hospital, including free formula for the victim. The appellant also received food stamps and social security benefits.

The State introduced into evidence all of the exhibits submitted at the appellant's guilty plea hearing, including statements from people who provided home health services to the victim and statements from the appellant. The appellant introduced additional exhibits into evidence, including her psychosocial history, compiled by Morgan Rogers; the forensic pathologist's statement about the victim's autopsy; and photographs of the victim.

The State introduced the appellant's presentence report into evidence. According to the report, the then thirty-three-year-old appellant was divorced with three surviving children aged fourteen, nine, and seven. In the report, the appellant stated that she dropped out of high school during the tenth grade and never received vocational training or additional education. The appellant said that her mental health was poor and that she currently was taking antidepressant and antipsychotic medications. She also characterized her physical health as poor but did not report any health problems. In the report, the appellant admitted that she used cocaine in 2005 but did not report using any other illegal drugs. The appellant stated that she had been the primary caregiver for her children and had never been employed. The report shows that in 1999, the appellant passed a worthless check in the amount of $1.27. The State also introduced into evidence a certified copy of a 1992 Kentucky conviction for shoplifting.

The trial court stated that this case was a "terrible tragedy" and involved "a horrific set of facts for everyone." It applied enhancement factors (1), that the "defendant has a previous history

of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"; (4), that the "victim of the offense was particularly vulnerable because of age or physical or mental disability"; and (14), that the "defendant abused a position of public or private trust," to the appellant's sentences. Tenn. Code Ann. § 40-35-114(1), (4), (14) (2006). In mitigation, the trial court applied factors (11), that the "defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct," and (13), the catchall provision, on the basis that the appellant's background involved "certain cultural deprivation that may have influenced the neglectful behavior." Tenn. Code Ann. § 40-35-113(11), (13). The trial court held that the enhancement factors outweighed the mitigating factors. It noted that the appellant's potential punishment for the aggravated child neglect conviction, a Class A felony, was fifteen to twenty-five years, and that her range of punishment for the reckless homicide conviction, a Class D felony, was two to four years. See Tenn. Code Ann. § 40-35-112(a)(1), (4). The court ordered the appellant to serve concurrent sentences of nineteen years for the aggravated child neglect conviction and three years for the reckless homicide conviction. Although the trial court sentenced the appellant as a Range I, standard offender, it noted that she would have to serve one hundred percent of the nineteen-year sentence. See Tenn. Code Ann. § 40-35-501(i)(1), (2)(K).

II. Analysis

The appellant contends that her sentence for aggravated child neglect is excessive because the trial court misapplied enhancement factor (4), that the victim was particularly vulnerable due to age or physical or mental disability, because the victim's vulnerability is an element of the offense. She also contends that if the victim's vulnerability is not an element of the offense, then the trial court still misapplied the enhancement factor because she did not "[prey] upon her daughter's vulnerabilities in any manner that would make them relevant as factors motivating her conduct." The State contends that because the trial court sentenced the appellant pursuant to the 2005 amendments to the Sentencing Reform Act of 1989, she cannot contest the applicability of any enhancement or mitigating factors on appeal. The State also contends that, in any event, the trial court properly applied enhancement factor (4). We disagree with the State's contention that the appellant could not challenge the trial court's application of enhancement or mitigating factors but agree that the trial court properly applied enhancement factor (4).

First, we will address the State's claim that the appellant's being sentenced under the 2005 amendments to the 1989 Sentencing Act prohibits her challenging on appeal the trial court's application of any enhancement or mitigating factors. The sentencing hearing transcript reveals that at the beginning of the hearing, defense counsel orally informed the trial court that the appellant was electing to be sentenced under the June 7, 2005 amendments to the Act. The record reflects that the trial court sentenced the appellant under the new provisions. Prior to the amendments, Tennessee Code Annotated section 40-35-401 (2003) provided as follows:

> (b) An appeal from a sentence may be on one (1) or more of the following grounds:

> (1) The sentence was not imposed in accordance with this chapter; or
>
> (2) The enhancement and mitigating factors were not weighed properly, and the sentence is excessive under the sentencing considerations set out in § 40-35-103.

The 2005 amendments changed section -401(b)(2) to read, "The sentence is excessive under the sentencing considerations set out in §§ 40-35-103 and 40-35-210." Tenn. Code Ann. § 40-35-401(b)(2) (2006). The State contends that by omitting the reference to enhancement and mitigating factors in section -401(b)(2), the legislature "clearly intended to eliminate the trial court's application of them, or lack thereof, as an available ground for relief on appeal." We disagree. Amended section -401(b)(2) eliminated the reference to the weighing of the enhancement and mitigating factors. However, it maintained a defendant's right to appeal on the basis that his or her sentence is excessive, preserving the defendant's right to challenge the trial court's application of enhancement and mitigating factors to the sentence. If we were to accept the State's argument, then a defendant could never challenge a trial court's misapplication of enhancement or mitigating factors, and trial courts could mistakenly apply factors without a factual basis. We do not believe that is the result the legislature intended. Therefore, we conclude that the appellant's being sentenced under the 2005 amendments to the 1989 Sentencing Act does not preclude her from challenging the trial court's application of enhancement factor (4).

We now turn to the appellant's contention that the victim's vulnerability was an element of aggravated child neglect. The victim died in January 2005, and the appellant was indicted for first degree felony murder and aggravated child neglect in February 2005. Aggravated child neglect, as charged in this case, occurs when a child suffers serious bodily injury caused by neglect. See Tenn. Code Ann. § 39-15-402(a). At the time the appellant committed the offense, the statute also provided that "if the abused or neglected child is six (6) years of age or less, the penalty is a Class A felony." Tenn. Code Ann. § 39-15-402(b) (2003). However, on July 1, 2005, nine months before the appellant pled guilty, the legislature enacted "Haley's Law," which amended Tennessee Code Annotated section 39-15-402(b) to read "that, if the abused, neglected or endangered child is eight (8) years of age or less, or is vulnerable because the victim is mentally defective, mentally incapacitated or suffers from a physical disability, the penalty is a Class A felony."

The appellant notes that the record is silent as to whether she pled guilty to aggravated child abuse and neglect pursuant to Haley's Law and argues that "[a]ssuming that the defendant elected to enter her guilty plea pursuant to 'Haley's Law,' then it seems clear that the enhancement factor involving the victim's particular vulnerability would be an element of the offense." However, as we mentioned previously, the appellant has failed to include the guilty plea hearing transcript in the record for our review. "It is the [appellant's] duty to have prepared an adequate record in order to allow a meaningful review on appeal." State v. Goodwin, 909 S.W.2d 35, 43 (Tenn. Crim. App. 1995). Failure to include the guilty plea hearing transcript in the record prohibits the court's conducting a full de novo review of the sentence under Tennessee Code Annotated section

40-35-210(b), and we presume that the trial court's ruling on the issue is correct. See State v. Bennett, 798 S.W.2d 783, 789-90 (Tenn. Crim. App. 1990). In any event, the appellant committed the offense and was indicted prior to the enactment of Haley's Law. There was no mention of Haley's Law at the sentencing hearing, and the appellant never argued at the hearing that factor (4) could not be applied to her sentences on the basis that she had pled guilty pursuant to the new law. Thus, we find no merit to the appellant's claim that she pled guilty to the offense under Haley's Law, and, therefore, that the trial court could not apply the vulnerability enhancement factor because it was an element of the offense.

That said, we also find no merit to the appellant's claim that the vulnerability enhancement factor could not be applied to her sentences pursuant to the 2005 sentencing law because the State failed to show that the victim's vulnerability was a factor in the appellant's commission of the offenses. Our supreme court has stated that a trial court may apply this enhancement factor when the victim is "incapable of resisting, summoning help, or testifying against the perpetrator." State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). Vulnerability is "a factual issue to be resolved by the trier of fact on a case by case basis." Id. In this case, the evidence indisputably shows that the victim was severely physically disabled and totally dependent upon the appellant for her care. She was incapable of resisting or summoning help, and the trial court properly applied this enhancement factor.[1]

We note that the State's brief asks this court to consider whether defense counsel's orally stating at the sentencing hearing that the appellant was electing to be sentenced under the 2005 amendments to the 1989 Sentencing Act was sufficient to serve as a waiver of her ex post facto protections. The Compiler's Notes to Tennessee Code Annotated section 40-35-210 provide that

> [o]ffenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

It is the State's position that the oral announcement was sufficient and that a written waiver was not required. However, we conclude that such waiver must be written. See State v. Jarvis Harris, No. W2006-02234-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 678, *30 (Jackson, Aug. 24, 2007); State v. Marco M. Northern, No. M2005-02336-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 459, **52-53 (Nashville, June 11, 2007); see also Black's Law Dictionary 589 (7th ed. 1999) (defining

[1]We review the sentencing claims as presented on appeal from sentencing pursuant to the 2005 sentencing law. We realize that, should the appellant be resentenced on remand pursuant to the old law, the use of any enhancement factors other than factor (1) would be, to say the least, problematic, given the dictates of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007).

"execute" as "[t]o make (a legal document) valid by signing)." Therefore, we remand this case for resentencing under the old sentencing law or for the appellant to execute a written waiver of ex post facto protections.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the appellant's convictions but conclude that this case must be remanded to the trial court for proceedings consistent with this opinion.

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NORMA McGEE OGLE, JUDGE